Baltimore Gas & Electric Company *and* International Brotherhood of Electrical Workers, Local 1900, AFL–CIO, Petitioner. Case 5–RC–14351

November 9, 1999

ORDER DENYING REVIEW

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Employer's Request for Review of the Regional Director's Order approving withdrawal of petition is denied as it raises no substantial issues warranting review. (Relevant portions of the Regional Director's Order are attached as an appendix.) The Employer's motion to dismiss, or in the alternative to stay, Cases 5–RC–14906, 5–RC–14907, 5–RC–14908, and 5–RC–14909 also is denied.

Contrary to our dissenting colleague, we find that the Regional Director acted properly in allowing the Petitioner to withdraw its petition. The Casehandling Manual section cited by our colleague squarely grants the Regional Director the discretion to approve the Petitioner's withdrawal request, since a new election would not be held within 12 months of the previous, October 1998 election. The obvious purpose of the 12-month requirement is to ensure that the policies behind Section 9(c)(3) of the Act are honored, and our colleague admits that those policies are being followed here. There is, therefore, no basis on which to claim, and, indeed, our colleague does not even purport to claim, that the Regional Director abused his discretion.

Also misplaced is our colleague's attempt to analogize this case to an employer's effort to withdraw its RM petition where the union has won the election and the employer has filed objections. In the RM petition scenario, permitting withdrawal of the petition would allow the employer to reverse the outcome of the election and leave the employees without union representation, even if the employer's objections to the conduct of the election were without merit. In contrast, in the instant case, the effect of the Union's withdrawal is to leave the Union in the same position it would be in were it ultimately to be determined that it lost the election and that its objections were unmeritorious. The employees are still unrepresented, and if the Union wants to try again to obtain representation rights, it must file a new petition for another election, which cannot be held less than 12 months from the date of the first election.[1]

Our colleague concedes that if we were to refuse to allow the Union to withdraw its petition, there would be "additional work" to be done in this case. That is certainly an understatement. Before the votes in the October 1998 election can be finally counted and the results of the election certified, a hearing must be held and determinations made as to the voting eligibility of more than 700 employees whose ballots were challenged,[2] the merits of the Petitioner's 17 objections as to which the Board has directed a hearing may also have to be resolved. Rulings on these matters at the regional level may be appealed to the Board and, if the Board proceedings result in certification of the Union, may ultimately be reviewed by a circuit court of appeals. To require the parties and the Board to expend the resources necessary to complete that process in order to reach a result which, at best from the Employer's point of view, would be the same as that which obtains as a result of the union's withdrawal of its petition would, in our view, be the height of bureaucratic folly. We therefore decline to follow our dissenting colleague in pursuing that course of action.

MEMBER HURTGEN, dissenting.

My colleagues would permit the Union to abort the election process after two elections have been held. I would not do so. Accordingly, I dissent.

The initial election was held in December 1996. It was set aside by agreement of the parties. A second election was held in October 1998. The result was 1178 for the Union, and 1298 against the Union. There were 726 challenged ballots, and objections from both sides. The challenges and the Union's objections are pending.

On October 14, 1999, the Union requested withdrawal of the petition. The Employer opposed the request. The Regional Director granted the request. The Employer has appealed.

The issue is whether the Union can abort the electoral process after two elections have been held. As noted, I would not permit the Union to do so.

There are strong policy reasons for not permitting the withdrawal. Two elections have been held. The public's money has been spent. The parties have spent time and money in their respective campaigns. Most importantly, the employees have registered their choices. In these circumstances, there should be a great reluctance to nullify the whole process simply because one party wants to do so.

The Manual reflects this policy.

Manual Section 11116.3 provides, in pertinent part, as follows:

[1] The true parallel to Member Hurtgen's RM petition scenario would be a scenario whereby a union which had lost a representation election could, by withdrawing its petition, negate the results of the election and actually become the employees' bargaining representative. That is obviously not what has happened here.

[2] Of the 3202 votes cast in the election, 1178 were for the Union, 1298 were against the Union, and 726 were challenged ballots. Because the number of challenged ballots is determinative, the outcome of the election cannot be known until the challenges are resolved and the ballots of any challenged voters found to be eligible are opened and counted.

> A request to withdraw the petition, submitted while objections are pending, should normally not be approved. Sec. 11116.1. However, the Regional Director has the discretion to approve a request to withdraw the petition while objections are pending when no party objects or if the petitioner agrees, in writing, that it will not file a petition seeking an election to be held less than a year after the first election.

My colleagues seize upon the second sentence, and they note that the second of the alternative conditions is present. That is, a new election would not be held within 12 months of the October 1998 election. However, my colleagues ignore the lead sentence of the section. Reading the two sentences in tandem, it is clear that the Regional Director lacks the discretion to approve a withdrawal request if neither of the two conditions is present. The Regional Director has discretion to approve the request if either of the conditions is present. However, that discretion must take into account the first sentence and the strong policy considerations behind it. Phrased differently, there must be a strong showing as to why the preferred policy is not being followed. There is no such showing here. Indeed, the Regional Director does not even take into account the policy considerations discussed above. Accordingly, he acted outside the discretion granted him by Section 1116.3. Thus, the request should be denied.

Concededly, a denial of the request would mean that there is additional work to be done in this case. The challenges and objections must be resolved. But that is the Board's statutory obligation, and it should not shrink from this obligation simply because one party wants it to do so.

My position is an even handed one. For example, assume that an employer files a RM petition in response to a union demand for recognition. The election is held, the union wins, and the employer files objections. Query: would the Board permit the employer to withdraw its petition while the objections are pending? I think that the answer is clearly "no." The Board would continue to process the case and, if the objections were overruled, the Board would certify the union as the representative. I assume that my colleagues would do the same thing. If that is true of an RM case, it should also be true of a RC case.

My colleagues attempt to differentiate between the RM and RC situations. Their effort is not successful. They say that the withdrawal of the RM petition would result in the negation of the employees' prounion vote (assuming that the employer's objections are without merit), whereas the withdrawal of the RC petition is consistent with the employees' antiunion vote (assuming that the union's objections are without merit). Thus, my colleagues would deny the request to withdraw the RM case and would grant the request in the RC case. My colleagues have missed the essential similarity in the two cases, and this similarity goes to the essence of the Act. In both cases, the critical point is that we should allow the employees' secret-ballot choice to be effectuated. If they have voted for the union in the RM case, the union should be certified. If they have voted against the union in the RC case, that result should be certified. And, in this latter regard, there is a difference between simply retaining nonunion status and effectuating the secret-ballot choice of employees to be nonunion.

Further, in the instant case, my colleagues' argument has no relevance at all. As noted above, there are determinative challenges in this case, and thus the union's current arithmetic loss could result in a union certification. I obviously do not care what the elected result will be. I simply care about effectuating the employees' secret ballot choice. Thus, I dissent from the aborting of the electoral process.

Finally, my colleagues, resorting to hyperbole, say that my position would be "the height of bureaucratic folly." In truth, and speaking more moderately, I believe that my approach is not "folly," but rather the fulfillment of the Board's responsibilities. Over 2000 employees have spoken. It is not folly to listen to what they have to say.[3]

In sum, the Board should not permit the election process to be aborted at the mere request of a party, whether that party be the employer or the union. I would therefore deny the request to withdraw.

APPENDIX

In connection with the above case, the Petitioner, International Brotherhood of Electrical Workers, AFL–CIO, has submitted a request that it be permitted to withdraw its petition in the above case. At the same time, the Petitioner filed four separate petitions seeking elections in varying units of the Employer's operations.

A first election was held in December 1996, and the parties agreed to set aside the election and conduct a second election. The second election was conducted on October 14 and 15, 1998, with 1178 votes being cast for the Petitioner and 1298 votes being cast against the Petitioner. In addition there were approximately 726 challenged ballots and these ballots were, of course, determinative. Both the Petitioner and the Employer filled objections to the conduct of the election. On February 10, 1999, I issued a Second Supplemental Decision dismissing all objections filed by the parties. Both parties filed a Request for Review and ordered that a hearing be held with respect to certain objections. The Employer's Re-

[3] If the instant petitions are withdrawn, the employees may never be heard. Although the Union has filed new petitions in four separate units, we do not know whether these petitions will result in elections. Further, even if they do, the units will not cover all of the employees involved herein, and the employees will vote in fragmented groups.

quest for Review was denied. On October 6, 1999, the Board denied the parties' motions for reconsideration.

Subsumed in the Petitioner's request to withdraw the petition is its request that its objections be withdrawn. That request is granted. While there are determinative challenges remaining in the election conducted in October 1998, I have concluded that this issue does not preclude my approval that the petition in its entirety be withdrawn. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11116.1–11116.3. Accordingly, with my approval the petition in the above matter has been withdrawn without prejudice.